

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALBERTO GUERRERO,

Petitioner,

vs.

JAMES M. SCHOMIG, *et al.*,

Respondents.

2:04-cv-00454-KJD-GWF

ORDER

This habeas matter under 28 U.S.C. § 2254 comes before the Court on the petitioner's application (#24) for a certificate of appealability (COA). Petitioner seeks to appeal the Court's dismissal of the petition on the merits.

Under 28 U.S.C. § 2253(c), the petitioner must make a "substantial showing of the denial of a constitutional right" in order to obtain a COA when the district court has denied a habeas claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). To satisfy this standard, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong." *Slack*, 529 U.S. at 484, 120 S.Ct. at 1604.

In the present case, reasonable jurists would not find the denial of relief on petitioner's claims to be debatable or wrong.

1 **Ground 1(a)**

2 In Ground 1(a), petitioner contended: (1) that he was denied effective assistance when
3 his trial counsel allegedly conceded his guilt during closing argument and; (2) that he was
4 denied due process by the state trial court's actions after he objected to his counsel's closing.

5 On the first aspect of Ground 1(a), it is abundantly clear from the state court record,
6 see #19, at 5-8, that counsel was trying to defeat rather than concede guilt for first degree
7 murder and that the closing argument was the product of a tactical decision by counsel.
8 Further, there was not a reasonable probability that the outcome of the trial would have been
9 different if counsel instead had attempted to base the closing on a strained argument that the
10 State had failed to establish either that Guerrero was present or that he was involved in the
11 shooting. Guerrero faced overwhelming evidence that he was engaged in a confrontation with
12 the victim at the very instant of the shooting and that the victim's body was riddled with
13 multiple gunshot wounds from the .22 registered to Guerrero. If trial counsel instead had
14 based his closing on the proposition that the jury simply should ignore this compelling
15 evidence, the reasonable probability is that Guerrero still would stand convicted of first degree
16 murder. Counsel's closing argument at the very least allowed for the possibility of a lesser
17 verdict by the jury, without affirmatively conceding guilt on any charge. The Nevada Supreme
18 Court's rejection of this claim was fully consistent with governing Supreme Court law.¹

19 ///

20
21 ¹*Accord Florida v. Nixon*, 543 U.S. 175, 192, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004)(when facing the
22 distinct possibility of a penalty phase, it can be reasonable for defense counsel to concede guilt in a
23 guilt-phase closing argument in an attempt to "impress the jury with his candor," for purposes of building on
24 that impression during the penalty phase; and a failure to obtain the defendant's express consent to the
25 strategy does not automatically render counsel's performance deficient); *Yarborough v. Gentry*, 540 U.S. 1,
26 7-10, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)(per curiam)(defense attorneys often must make strategic decisions
27 as to what arguments to include in closing arguments and may choose to acknowledge the "shortcomings" of
28 their client's case in order to build credibility with the jury); see also *Hovey v. Ayers*, 458 F.3d 892, 905-07 (9th
Cir. 2006)(counsel's closing statements, even if properly characterized as concessions, did not constitute
deficient performance and further did not prejudice petitioner). In his COA application, petitioner cites to
United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991). Over and above the fact that *Swanson* is an
appellate federal criminal case that predates the above-cited Supreme Court decisions, the case is
distinguishable in substance because there was absolutely no strategy in *Swanson* for defense counsel's
closing statement, in which counsel completely conceded guilt and told the jurors they should not worry about
whether they had done the right thing if they found the defendant guilty.

1 On the second aspect of Ground 1(a), the trial transcript reflects that Guerrero's
2 outburst occurred during the *State's penalty phase* closing argument, not during his counsel's
3 guilt phase closing arguments. The state court's handling of the outburst therefore could not
4 have prejudiced Guerrero. The guilt phase already had been concluded, and in the penalty
5 phase he received the sentence sought by the defense, life with the possibility of parole after
6 forty years rather than life without the possibility of parole. Moreover, the state trial judge's
7 threat to do exactly what the Supreme Court held in *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct.
8 1057, 25 L.Ed.2d 353 (1970), to be "constitutionally permissible" indisputably does not give
9 rise to a due process violation. This Court therefore rejected the claim on *de novo* review.

10 **Ground 1(b)**

11 In Ground 1(b), petitioner contended that he was denied effective assistance of
12 counsel because his counsel failed to investigate evidence to support a defense that the
13 victim was killed in a drive-by shooting from a passing white car while Guerrero and his co-
14 defendant father "watched in horror." Petitioner alleged that counsel failed to investigate the
15 victim's propensity for violence, failed to interview neighbors who witnessed the drive-by
16 shooting, failed to discover their value for trial, and failed to establish the impact their live
17 testimony would have on the jury.

18 Guerrero did not come forward with any evidence at the state court evidentiary hearing
19 tending to establish that defense counsel would have been able to support the drive-by
20 shooting theory with credible evidence if he had pursued the issue further. In particular,
21 petitioner failed to present any evidence that a single neighbor in fact would have testified that
22 they witnessed a drive-by shooting. Guerrero's central allegation that an adequate defense
23 investigation would have developed such eyewitness testimony by neighbors therefore was
24 wholly unsupported and speculative. His remaining allegations on the claim similarly were
25 unsupported. Moreover, when the state district judge asked petitioner to explain how the
26 drive-by shooting occurred, Guerrero could not provide a coherent explanation as to how the
27 use of his .22 in the shooting fit in with his mystery white car theory. Petitioner's story
28 accordingly both was wholly unsupported and further was not capable of being explained

1 coherently and rationally in a manner that was not contradicted and belied by the physical
2 evidence presented. The Nevada Supreme Court's rejection of this wholly fanciful claim was
3 neither contrary to nor an unreasonable application of *Strickland*.

4 **Ground 2(a)**

5 In Ground 2(a), petitioner contends that he was denied effective assistance of counsel
6 because his counsel failed to cross-examine the State's witnesses regarding the victim's
7 alleged propensity for violence, habitual possession of a handgun, and involvement with gang
8 violence, in support of Guerrero's claim that the victim precipitated the alleged drive-by
9 shooting.

10 At the state post-conviction evidentiary hearing, petitioner's trial counsel testified that
11 there was no evidence that the victim possessed a handgun or that he was a member of a
12 gang. He further did not believe that it was a good tactic to attack the dead victim at trial in
13 the face of evidence, *inter alia*, that he was shot multiple times with Guerrero's .22, because
14 the strategy could backfire and turn the jury against the defense. Guerrero did not come
15 forward with any evidence at the state court evidentiary hearing tending to establish that, if
16 defense counsel had inquired on cross-examination, any State witness in fact would have
17 testified that the victim had a propensity for violence, habitually carried a handgun, or was
18 involved with gangs. The petitioner's claim thus was based on the wholly speculative premise
19 that cross-examination of the State's witnesses would have elicited favorable defense
20 testimony on these points in the absence of any other evidence that the victim had a
21 propensity for violence, carried a gun, or was involved with gangs. Further, the claim was part
22 and parcel of Guerrero's drive-by shooting theory of defense, a theory that, at best, strained
23 credulity, and, at worst, was directly contradicted by the undisputed physical evidence. The
24 Nevada Supreme Court's rejection of this similarly fanciful claim also was neither contrary to
25 nor an unreasonable application of *Strickland*. The two cases that petitioner cites in his COA
26 application on this claim both are wholly inapposite, and the second case additionally is a
27 California state court decision rather than a United States Supreme Court decision.

28 *////*

1 **Ground 2(b)**

2 In Ground 2(b), petitioner contended that he was denied effective assistance of
3 counsel because his counsel allegedly refused to allow him to testify at trial. Guerrero alleged
4 that he demanded to be called to the stand to testify on his own behalf to tell the jury about
5 the alleged drive-by shooting and the victim's alleged propensity for violence.

6 On this claim, the Nevada Supreme Court determined that there was no indication in
7 the record that petitioner had been improperly prevented from testifying in his own defense.
8 Petitioner has not identified any contrary evidence in the state court record, and the Nevada
9 Supreme Court's factual finding therefore is entitled to a presumption of correctness under
10 28 U.S.C. § 2254(e)(1). Moreover, at trial, Guerrero sat silently by; and he made no claim on
11 the record that he allegedly instead wished to testify at trial until well after the fact when he
12 sought post-conviction review. Under the Ninth Circuit law cited in the order of dismissal,
13 such silence constitutes a waiver of the claim. Finally, there was not a reasonable probability
14 that the outcome of the trial would have been better if Guerrero had taken the stand and told
15 his fanciful drive-by shooting story to the jury. If petitioner could not provide the state court
16 judge with a coherent and rational explanation of the drive-by story in the relative calm of a
17 post-conviction hearing, there is no rational possibility that Guerrero would have persuaded
18 a jury with the story after being subjected to the rigors of cross-examination by a prosecutor
19 in a first degree murder trial. The Nevada Supreme Court's rejection of this claim therefore
20 was neither contrary to nor an unreasonable application of *Strickland*.

21 **Ground 3**

22 In Ground 3, petitioner contended that he was denied effective assistance of counsel
23 because his counsel failed to move to suppress Maria Maldonado's testimony on the basis
24 that her testimony was unreliable. Petitioner maintained that her testimony could have been
25 excluded because she changed her account of what happened over the course of the case
26 and further because of her close relationship with the victim. He urged that if her testimony
27 had been excluded, the police then would have investigated further and would have found the
28 alleged drive-by shooters from the mystery white car.

1 Guerrero does not cite any apposite authority holding that the testimony of a witness
2 can be excluded on a motion to suppress based upon alleged variances between her trial
3 testimony and prior statements and/or based upon her close relationship with the victim or
4 others. There of course is no such authority. Guerrero's trial counsel did not render deficient
5 performance by failing to file such a baseless motion nor was he prejudiced as a result.

6 **Ground 4**

7 In Ground 4, petitioner contended principally that he was denied effective assistance
8 of counsel by the cumulative effect of the foregoing claims of ineffective assistance of
9 counsel. Petitioner's ineffective assistance claims have no more merit in the aggregate than
10 they do viewed singly.

11 IT THEREFORE IS ORDERED that the petitioner's application (#24) for a certificate
12 of appealability is DENIED as to all claims.

13 DATED: May 14, 2007.

14
15
16 

17 KENT J. DAWSON
18 United States District Judge
19
20
21
22
23
24
25
26
27
28